

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1806

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

B

EXXON CORPORATION,

Plaintiff-Appellant

v.

THE CITY OF NEW YORK, ENVIRONMENTAL PROTECTION
ADMINISTRATION OF THE CITY OF NEW YORK and
ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION
ADMINISTRATION OF THE CITY OF NEW YORK,

P/S

Defendants-Appellees

GETTY OIL CO., (Eastern Operations), INC.,
GULF OIL CO.-U.S., MOBIL OIL CORPORATION and
SUN OIL COMPANY OF PENNSYLVANIA,

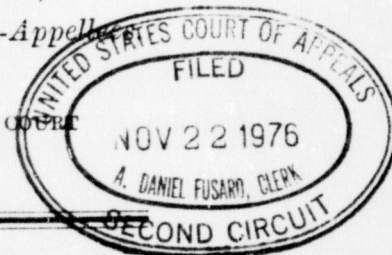
Plaintiffs-Appellants

v.

THE CITY OF NEW YORK, HERBERT ELISH,
Environmental Protection Administrator of the City of New York,
and THE ENVIRONMENTAL PROTECTION
ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



SUPPLEMENTAL BRIEF FOR APPELLANTS

SHEA GOULD CLIMENKO & CASEY
Attorneys for Plaintiffs-Appellants

GETTY OIL CO., (Eastern Operations), INC.,
GULF OIL CO.-U.S., MOBIL OIL CORPORATION
and SUN OIL COMPANY OF PENNSYLVANIA
330 Madison Avenue, New York, N.Y. 10017

MILES F. McDONALD
RICHARD F. CZAJA
Of Counsel



TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
ISSUE PRESENTED FOR REVIEW	1
STATEMENT OF FACTS	2
ARGUMENT - LOCAL REGULATION OF GASOLINE VOLATILITY HAS BEEN PREEMPTED BY THE FEDERAL REGULATIONS	3
CONCLUSION	5

TABLE OF AUTHORITIES

Cases:

	<u>Page</u>
<u>Ethyl Corp. v. Environmental Protection</u>	
<u>Agency, No. 73-2205 (D.C. Cir, March</u>	
<u>19, 1976)</u>	
Slip opinion	4

Statutes:

42 U.S.C. §1857f-6c(a)(1)(A)	4
42 U.S.C. §1857f-6c(c)	3

Regulations:

40 C.F.R. §80.1	3
40 C.F.R. §80.20	4
40 C.F.R. §80.22	3

Local Regulations:

Administrative Code of the	
City of New York, Ch. 57 §1403.2 -	
13.12	2

PRELIMINARY STATEMENT

This Supplemental Brief is submitted by appellants Getty Oil Co. (Eastern Operations), Inc., Gulf Oil Co., -- U.S., Mobil Oil Corporation, and Sun Oil Company of Pennsylvania ("the Getty plaintiffs") seeking reversal of the decision and Order of Hon. Charles E. Stewart, Jr., dated March 8, 1974 denying their motion for summary judgment. This brief supplements a main brief filed by the Getty plaintiffs jointly with appellant Exxon Corporation and deals solely with certain regulations challenged by the Getty plaintiffs but not challenged by Exxon Corporation.

ISSUE PRESENTED FOR REVIEW

Has the promulgation of two comprehensive sets of regulations by the Federal Environmental Protection Agency preempted local regulation of the volatility of gasoline as provided in the express preemption provisions of the Clean Air Act Amendments of 1970?

STATEMENT OF FACTS

In addition to seeking relief from the City's lead restrictions, as set forth in the main brief, plaintiffs in the Getty action seek injunctive and declaratory relief from the provisions of §1403.2-13.12 of Chapter 57 of the City's Administrative Code regulating the volatility of gasoline (the "volatility regulations"). This section provides:

"Effective October 1, 1971, no person shall cause or permit the use, or, if intended for use in the city of New York, the purchase, sale, offer for sale, storage or transportation of gasoline which exceeds the following volatility limits:

(a) For the period October 1, through April 30, not to exceed 12 Reid Vapor pressure.

(b) For the period May 1, through September 30, not to exceed 7 Reid vapor pressure."

The Getty plaintiffs' motion for summary judgment insofar as it sought relief from the volatility as well as the lead regulations was likewise denied by Judge Stewart. As in the case of the lead regulations, Judge Stewart found that no federal preemption had occurred (137a-138a).

ARGUMENT

LOCAL REGULATION OF GASOLINE VOLATILITY HAS BEEN PREEMPTED BY THE FEDERAL REGULATIONS

The Getty plaintiffs respectfully submit that, as in the case of the lead regulations, the City volatility regulations violated the specific Congressional mandate regarding federal preemption contained in the Clean Air Act. As discussed in the main brief, the Act provides in relevant part that ". . . no State (or political subdivision thereof) may prescribe or attempt to enforce . . . any control or prohibition respecting use of a fuel . . . if the Administrator has prescribed . . . a control or prohibition applicable to such fuel . . ." (emphasis supplied) (42 U.S.C. §1857f-6c(c)).

For the reasons set forth at length in the main brief, the regulations contained in 40 C.F.R. Part 80 as most recently amended in 41 Fed. Reg. 42675-42677 (Sept. 28, 1976) are unquestionably a control applicable to the fuel gasoline. Section 80.1, which defines the scope of Part 80, states that "This part prescribes regulations for the control and/or prohibition of fuels and additives for use in motor vehicles and motor vehicle engines." Section 80.22 requires gasoline

retailers to offer unleaded gasoline for sale. Section 80.20, the lead regulations, requires a step-wise reduction of the lead content of leaded gasoline. When the EPA acts pursuant to 42 U.S.C. §1857f-6c(a)(1)(A) (§211(c)(1)(A) of the Clean Air Act) as it did in promulgating §80.20 "it is essentially telling manufacturers how to make their fuels . . ." (Ethyl Corp. v. Environmental Protection Agency, No. 73-2205 (D.C. Cir. March 19, 1976) slip opinion at 16 n. 14.)

Since the Administrator has prescribed controls applicable to gasoline, the volatility regulations as a control respecting the use of gasoline have been statutorily preempted. The volatility regulations can stand only under a theory that the City is free to regulate gasoline volatility until such time as the Administrator promulgates a regulation specifically dealing with this particular characteristic of gasoline. Such a theory is inconsistent with the above quoted language of the Clean Air Act as well as with the obvious policy considerations underlying that language.

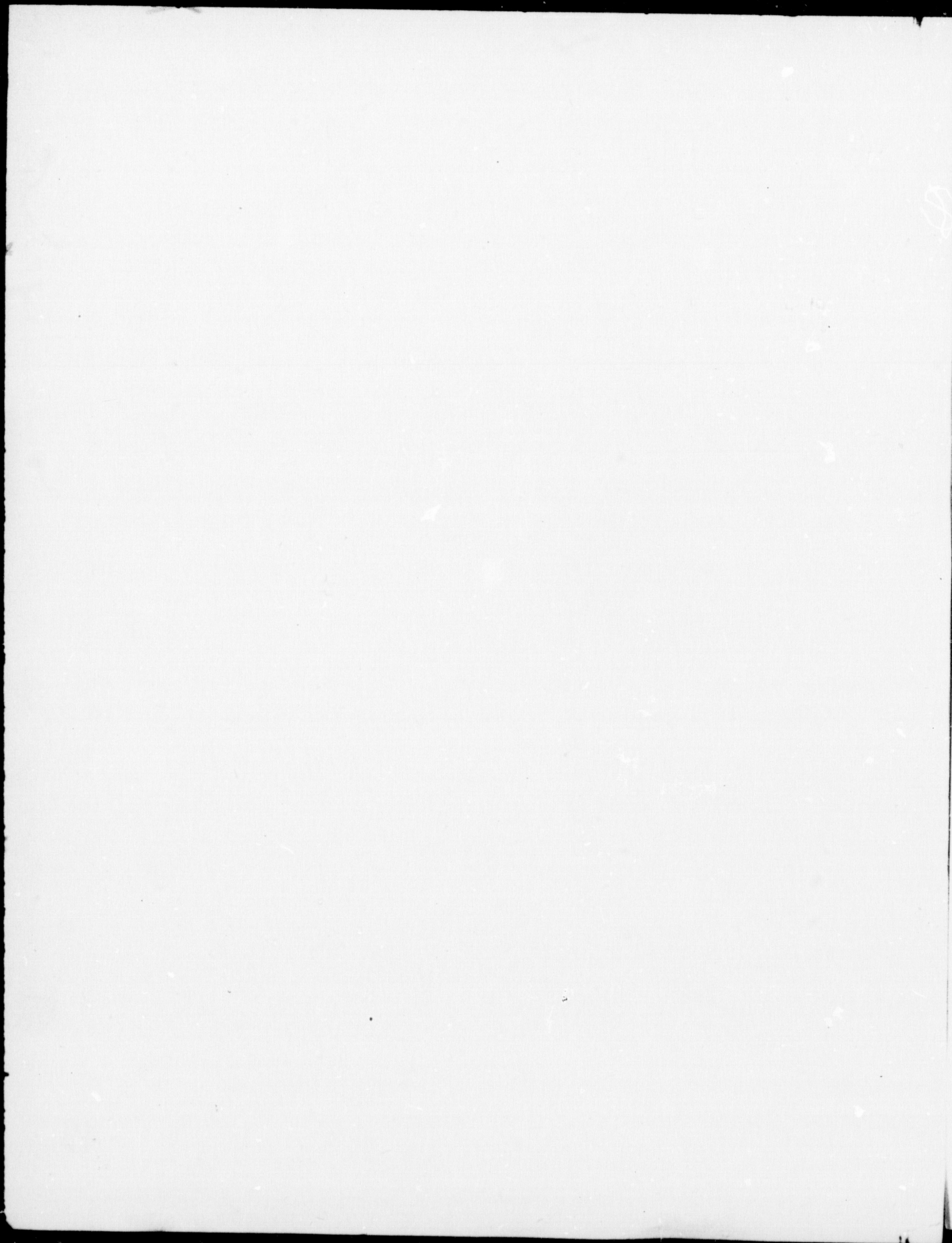
The federal preemption statute is clearly intended to prevent piecemeal local regulation of particular characteristics of a fuel once the Administrator has acted with respect to that fuel. Any alternative interpretation of the statute

will involve the courts in endless technical determinations of the relationship of one characteristic of a fuel to another. Thus under the "inevitable collision" test as applied by the Court below, the Court in the instant case must determine whether regulation of volatility inevitably conflicts with regulation of lead content. Another locality may in turn regulate yet another characteristic of gasoline requiring the courts to determine the relationship of that characteristic to lead content. The language of the preemption statute was clearly intended to forestall entanglement by the courts in such technical questions once the EPA had acted with respect to a particular fuel such as gasoline. In effect, it has been established by Congressional fiat that control of any particular characteristic of gasoline "inevitably collides" with regulation of gasoline content by the EPA. Once the EPA has acted, local regulation of particular gasoline characteristics is precluded.

Thus, it is respectfully submitted that the City's volatility regulations should be declared null and void, and that the City be enjoined from enforcing said regulations.

CONCLUSION

The volatility regulations clearly have been preempted by federal regulations. For the reasons stated herein and in



appellants' main brief, the decision of the court below, denying plaintiffs' motion for summary judgment, should therefore be reversed and this case should be remanded to the district court for an order granting plaintiffs' motion for summary judgment on the first cause of action and severing the second cause of action.

Respectfully submitted,

SHEA GOULD CLIMENKO & CASEY
Attorneys for Plaintiffs-Appellants
Getty Oil Co. (Eastern Operations),
Inc., Gulf Oil Co. - U.S., Mobil
Oil Corporation, and Sun Oil
Company of Pennsylvania
330 Madison Avenue
New York, New York 10017
(212) 661-3200

Of Counsel:

Miles F. McDonald
Richard F. Czaja